ANALYSIS OF THE FOURTH CIRCUIT

A. Number of Authorized Judges and Current Request for Additional Judges

Even though only 13 out of the 15 statutorily allocated Fourth Circuit judgeships are filled, the court has been functioning smoothly and efficiently with its current number of judges. Importantly, Chief Judge Harvie Wilkinson does not support filling the current vacancies. Judge Wilkinson testified that adding to the present number of judgeships would make the Fourth Circuit less efficient, and would result in the public actually being less well served than is presently the case.

B. Discussion of Fourth Circuit Caseload

Since 1983, the number of cases filed per year with the Fourth Circuit has more than doubled. For example, in 1995, there was a 30% increase in filings. However, when considering these numbers, one must examine the type of cases which have been filed. For example, since 1991, there has been a total increase of 1491 filings, 897 or 60% of which were prisoner petitions. Prisoner cases have been the single largest increase, but these cases are generally handled through an expedited process. Therefore, the mere fact of an increase in filings does not automatically indicate a need for more judges. Otherwise, according to Judge Wilkinson, prisoner petitions will "dictate the size of the federal judicial system." Judge Wilkinson indicated that the Prison Litigation Reform Act should be given time so that its effectiveness in reducing the federal caseload can be studied.

Judge Wilkinson observed that even if the number of appeals is on the rise, adding new judges to an appellate court can often result in poorer and slower decision making. He warned that the stability and clarity of a circuit's rule of law is jeopardized each time a new judge is added to the court.

C. Fourth Circuit Case Management

The Fourth Circuit utilizes a screening mechanism to identify the more significant cases and only allows those cases 30 minutes of oral argument time per side. Approximately 25% of fully and formally briefed cases are decided without oral argument. The circuit, however, has safeguard mechanisms to ensure that every litigant has his/her due process rights maintained. For example, if any single judge believes a case should be orally argued, the judge may put it on the scheduling calendar. According to Judge Wilkinson, this screening mechanism and the use of telephone conferencing have been so successful in quickly processing less significant cases, that the calendar clerk has often had trouble getting enough mature cases to fill out the next calendar. Judge Wilkinson added that, "given this historic problem, it seems difficult to make the case that additional judges are necessary."

The Fourth Circuit maintains a practice by which each draft opinion is circulated to every judge. While this practice may be time-consuming, Judge Wilkinson testified that it helps maintain consistency and uniformity in the circuit law and allows judges not sitting on the original panel to give their views. Consequently, Judge Wilkinson believed an increase in

permanent judges or visiting judges would only hinder and delay this system.

At the time of the Subcommittee hearing, the Fourth Circuit had the fastest disposition of cases of any of the circuits, even though the court was operating below its authorized strength. The average time for resolving a case from the time of filing the notice of appeal until the final disposition was 7.8 months. This same process ranged from 7.8 months to 14.7 months in other circuits. By this important measure, the Fourth Circuit is in excellent shape.

Court Schedule and Recess Period: The Fourth Circuit usually sits 9 times a year, with a 3 to 4 week adjournment between each sitting. The judges sit for one week every month between October and June, except for January. In addition, each judge sits for a summer session, usually held in July. Each judge sits for 5 days in each session and each 3-judge panel hears 20 cases per session. Each judge sits on en banc cases for approximately 5 or 6 days and hears oral arguments for a minimum of 45 days per court year.

Judge Travel: Judges in the Fourth Circuit took a total of 52 non-case related trips in 1995, for a total of 161 travel days (115 of which were workdays). Of these trips, 16 (31%) were to engage in activities such as law school seminars or bar association meetings. In 1996, the Fourth Circuit took the same number of non-case related trips as in 1995. The 52 trips consisted of 156 travel days, 113 of which were workdays. Of these trips, 22 (or 42%) were to engage in activities such as teaching law school or attending bar association meetings, and they comprised 63 travel days (39 of which were workdays).

From January 1, 1997 to September 30, 1997, Fourth Circuit judges took 35 non-case related trips. These trips consumed 105 travel days, 84 of which were workdays. Out of these 35 trips, 5 trips (14%) were to engage in law school and bar association activities, and they comprised 14 travel days (10 of which were workdays).

Use of Staff Attorneys: The Fourth Circuit permits staff attorneys to conduct telephone conferences in the most simple and straightforward of pro se cases. However, according to Judge Wilkinson, Fourth Circuit staff attorneys are not delegated excessive authority and judges are the ultimate decision-makers.

Use of Visiting Judges: The Fourth Circuit has a "longstanding practice" of inviting visiting judges to assist the circuit with its caseload. According to Judge Wilkinson, visiting judges can be broken down into three categories: all new Fourth Circuit district judges who have recently been confirmed; other district judges from within the circuit; and senior judges from other circuits. Judge Wilkinson noted that visiting judges from the district courts can acquaint themselves with the circuit court's work, while the appellate judges can learn about "the problems and perspectives of the trial bench." He believed that visiting judges make the Fourth Circuit "less parochial", and that it is beneficial to have the views from senior judges from other circuit courts.

Use of Senior Judges: The Fourth Circuit has three senior judges, who heard 13.2% of the court's caseload.

Use of Mediation Programs: In June 1994, the Fourth Circuit implemented a pre-argument conferencing program designed to encourage litigants to voluntarily settle their cases. The program settled 189 cases in 1995 and 229 cases in 1996. Judge Wilkinson was of the opinion that this Fourth Circuit program has the potential to increasingly relieve docket pressures without the need for creating additional judgeships.

D. Fourth Circuit Use of Other Court Efficiencies:

According to Judge Wilkinson, judges do not travel to preside at remote locations. He also testified that most of the judges do not have outside work activities. The few outside activities they do take part in include teaching and moot court competitions. Judge Wilkinson believed that these obligations do not substantially take away from time spent on the bench.

E. Conclusion

Chief Judge Wilkinson warned of several possible adverse consequences of increasing judgeship positions. He claimed that growth in the federal judiciary would impair the federal-state balance and increase the opportunity for federal judicial intrusion into state and local matters. Also, Judge Wilkinson testified that more judges would increase the number of intra-circuit conflicts and the need for en banc decisions to resolve these problems. He believed that the en banc court would not be a very effective instrument, because, for example, it would be impractical for a litigant to appear before - and be questioned by - 15 judges. Further, Judge Wilkinson explained that polls to determine whether to hold these sessions take a long time to complete, which in turn causes litigants to spend more time before a court awaiting decision. He felt that additional judges would only lead to more litigation, because the law of the circuit would be less distinct and people would not know what the law is.

Judge Wilkinson was also concerned about the lack of courtroom space in the circuit, which he thought would only be exacerbated should there be an increase in judges. He explained that the court already is in a position where it is forced to bump district judges out of their courtrooms when the Fourth Circuit sits in Richmond. Finally, Judge Wilkinson testified that if simply adding judges was viewed as the "panacea" to resolving all the federal judiciary's problems, that itself would discourage initiatives to improve efficiency within the system. In fact, Judge Wilkinson considered the vacant Fourth Circuit judicial positions as an impetus for his circuit to examine its procedures to determine how it can achieve more efficiencies. He also feared a situation where Congress and the judiciary would not have incentives to reduce federal caseloads because they would rely on creating judgeship positions to resolve the problem.

Based on the testimony of the judges themselves and based on the fluid and efficient disposal of cases by the court, it is clear that the current judicial vacancies in the Fourth Circuit should not be filled, nor should additional judges be allocated. After the Subcommittee concluded its hearing on the judgeship needs of the Fourth Circuit in February 1997, two additional vacancies occurred, thus reducing the number of active judgeships in the Fourth Circuit to 11. However, both of these new vacancies have since been filled and the Fourth Circuit now has 13 active judges, the same number of judges as were active when the Subcommittee held its

hearing on the Fourth Circuit. At the Subcommittee hearing, Judge Wilkinson argued that 13 active judges was an appropriate number for the Fourth Circuit and that the additional allocated judgeship positions should not be filled. There is no indication that the Fourth Circuit's needs have changed since the time of the hearing and, therefore, the existing vacancies should not be filled.

Chief Judge Harvie Wilkinson submitted no charts.